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SUPREME COURT OF THE UNITED STATES

October Term 1985

No._____

APR 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

VOLNEY CLENOM MORGAN,

PETITIONER,

V.

STATE OF CALIFORNIA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeal of the
State of California
Second Appellate District
Division 3

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QUESTION PRESENTED

Whether the State of California is collaterally estopped to try petitioner for murder after findings by the trial court after jeopardy had attached, in a trial on related charges, that petitioner was **not** the proximate cause of the death of his wife, an element that must be proven beyond a reasonable doubt in a California prosecution for murder, whether the meaning of **Ashe v. Swenson** 397 U.S. 436, 25 L. Ed.2d 469, 90 S. Ct. 1189.

CERTIFICATION AS TO INTERESTED PARTIES

The undersigned attorney, a member of the Bar of the Supreme Court of The United States, certifies that the following listed parties have an interest in the outcome of this case. These representations are made to enable justices of the court to evaluate possible disqualifications or recusal.

There are no interested parties other than those named in the caption of this case and their attorneys of record.

ROGER S. HANSON
Attorney for Petitioner
Member of the Bar U.S. Supreme Court

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No._____

VOLNEY CLENOM MORGAN,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeal

State of California

Second Appellate District

To the Honorable WARREN E. BURGER, Chief Justice of the United States and to the Honorable Associate Justices of the UNITED STATES SUPREME COURT:

Petitioner VOLNEY CLENOM MORGAN seeks Certiorari to the Court of Appeal of the State of California, Second Appellate District.

The Second Appellate District reversed dismissal of petitioner's charge of murder on December 3, 1985 and the Supreme Court of California denied review on February 14, 1986.

OPINION BELOW

The Court of Appeal of the State of California for the Second Appellate District, Division 3, reversed dismissal of murder charges against petitioner on **December 3, 1985.** A copy of that opinion appears as Appendix "A".

The California Supreme Court denied review to Petitioner. A copy of that Order appears as Appendix "B". The Supreme Court ordered the opinion published in the official reports.

JURISDICTION

This Honorable Court has jurisdiction to review this case under 18 U.S.C. § 1257 within 60 days after the final action of the highest state court. The Supreme Court of California denied a Hearing on February 14, 1986.

U.S. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or en-

force any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner VOLNEY CLENOM MORGAN was originally charged in California with a violation of Penal Code §187, murder of his wife, together with violations of California Business and Professions Code §2053 (practicing medicine without a license) and 3 counts of California Health and Safety Code §11377 (possession of a controlled substance).

Petitioner is a Doctor of Medicine, duly licensed to practice medicine in Missouri, and was previously licensed in California. Petitioner's California license to practice medicine was in a state of revocation at the time the alleged crimes occurred.

Petitioner was married to the decedent, who, on several occasions previous to the date in question, had attempted suicide.

On the date of the charged alleged crimes, petitioner was called to his home by telephone, his wife being then unconscious as a result of her latest suicide attempt. Petitioner, relying on his medical background, sought to resus-

citate and revive her by intravenous infusion of drugs available to him. This formed the basis for the charges of violations of Business and Professions Code §2053 and Health and Safety Code §11377.

Petitioner's wife passed away, ostensibly either from her own hand, or a combination of her own ingestion of drugs coupled with the intravenous compounds administered by petitioner to her.

In pre-trial motions following a detailed preliminary hearing wherein the charge of murder was extant, and was litigated, the trial level superior court granted a motion to dismiss the murder charge for insufficient evidence.

DOCTOR MORGAN was charged with murder, practicing medicine without a license feloniously, and with three counts of possesion of controlled substance (Physicians samples still left in the house.)

After a preliminary hearing, he was bound over on all charges, but after a 995 P.C. motion, Judge Loren Miller (a different Court than the one whose order is appealed from) dismissed the murder count; he ruled that there was insufficient evidence at the preliminary hearing to show that the Doctor's actions **were a proximate cause of the death** to hold DOCTOR MORGAN for murder.

The People filed a notice of appeal from that decision some two months later, but did not seek a stay of the trial on the remaining counts. The People did seek and obtain three continuances of the trial for a period of about five months, though all were sought because of scheduling

conflicts. None were sought to await the decision of the Court of Appeals and unite the counts if the court reversed. Only after a chambers conference on the day of the trial did the People seek a continuance on grounds of joinder which was objected to and denied, all witnesses being presented ready to testify at the Court trial.

The Court trial was heard by the Honorable Peter S. Smith, and the People proceeded to prosecute the three drug possession charges and the practicing medicine without a license charges. The People evidentiarily pursued two theories: (1) the Doctor practiced medicine in a manner which created risk of great bodily harm or death, and in the alternative, (2) if the circumstances and conditions did not create such a risk, then he practiced without a license and **he, in fact, caused her death.**

The Court acting as the trier of fact found that there was insufficient evidence that anything the Doctor had done was the proximate cause of the death, and therefore ruled aginst that second theory. The Court did find that the circumstances and conditions surrounding Defendant's practice of medicine on the deceased (not sending her to a hospital with superior equipment) created a risk. He found the Doctor, therefore, guilty of that charge, and the three possessions charges, but made them all misdemeanors by sentencing.

Subsequently, by Petition pursuant to 1203. 4 P.C., those misdemeanors were dismissed and the Doctor discharged from probation and the case.

Meanwhile, ten months after the trial, the Court of Appeals reversed the ruling of Judge Loren Miller dismissing the murder count pursant to 995 P.C. in **People v. Volney Morgan,** 2nd Crim. 43990. The People then sought to reinstate the murder charge and proceed against the Doctor. Defendant/Respondent then made a motion to dismiss on the grounds of collateral estoppel.

Judge Smith granted the motion. It is from that decision that the People then took this appeal and the Court of Appeal reversed. It is from this decision that certiorari is sought under the expanded reasoning of **Ashe v. Swenson** (1970) 397 U.S. 436, 90 S. Ct. 1189, 25L.Ed.2d 469.

ARGUMENT

WITHIN THE EXPANDED MEANING OF **ASHE V. SWENSON** 397 U.S. 436, 25 L.Ed.2d 469, 90 S. Ct. 1189, CALIFORNIA SHOULD BE COLLATERALLY ESTOPPED FROM TRYING PETITIONER FOR MURDER SINCE THE TRIAL COURT, AFTER JEOPARDY HAD ATTACHED IN THE COLLATERAL AND RELATED TRIAL OF PETITIONER FOR VIOLATIONS ARISING OUT OF HIS WIFE'S DEMISE, MADE A FINDING OF FACT THAT PETITIONER WAS NOT THE **PROXIMATE** CAUSE OF THE DEATH OF HIS WIFE. **PROXIMATE CAUSE** OF DEATH IS A NECESSARY ELEMENT IN THE CORPUS DELICTI OF MURDER IN CALIFORNIA.

In **Ashe v. Swenson**, 397 U.S. 436, 25 L.Ed.2d 469, 90 S. Ct. 1189, this Honorable Court enunciated the doctrine of collateral estoppel as an element of due process of law binding on the states, where issues of fact had once been resolved against the prosecution, foreclosing a retrial of a state criminal defendant after such findings of fact had been resolved against the State.

In the case at bar, petitioner seeks Certiorari to apply the doctrine of collateral estoppel to preclude and foreclose a state trial for murder in California where, in a fully related trial, the trial judge found that the state criminal defendant, petitioner herein, had not been shown to have been the proximate cause of the death of his wife.

The demonstration of proximate cause, an element of the California corpus delicti for murder, must be proven by the People to exist beyond a reasonable doubt. **In Re Winship**, 397 U.S. 358, 364.

The California Court of Appeals, in reversing the dismissal of the charge of murder, asserts that it was not **necessary** for the trial judge to resolve and enunciate that the People had not demonstrated that petitioner was the **proximate cause** of the death of his wife, since that exact murder charge was **not** then before the trial court.

However, the Court **did** make such a finding after hearing all of the evidence in the fully related charges of whether petitioner violated B & P Code § 2053, practicing medicine without a license and H & S Code § 11377, possession of a controlled substance, when petitioner, a

graduate M.D./physician, attempted to save his wife from death after she had attempted suicide. Petitioner's medical license was at that time revoked.

The cause of the death of petitioner's wife was **actually litigated**; see slip opinion, Appendix "A". The Court of Appeal then states:

> "... However, the issue of cause of death was **not necessarily decided** by the trial court . . ."

By this, the Court of Appeals errs that it was **unnecessary** to resolve guilt or innocence in the **charged** crimes for the trial court to have made the findings concerning reasonable doubt as to the proximate cause of death, **but** the trial court did make the findings, and made them in resolving whether the petitioner was "practicing medicine without a license" and was in possession of controlled substances not any longer authorized under an invalid medical license as petitioner labored to save his wife's life.

Thus, it is plain that the very integral and parallel issues of the trial for causes **other than** the murder caused the Trial Court to find, as a matter of fact, that petitioner was not shown, beyond a reasonable doubt, to have been the proximate cause of the death of his wife.

The standard CAL JIC (CALIFORNIA JURY INSTRUCTION CRIMINAL) instruction always read to a California murder jury is No. 8.55:

> To constitute [murder] [or] [manslaughter] there must be, in addition to the death of a

human being, an unlawful act which was a proximate cause of that death.

The proximate cause of a death is a cause which, in natural and continuous sequence, produces the death, and without which the death would not have occurred.

[There may be more than one proximate cause of a death. When the conduct of two or more persons contributes concurrently as proximate causes of a death, the conduct of each is a proximate cause of the death regardless of the extent to which each contributes to the death. A cause is concurrent if it was operative at the moment of death and acted with another cause to produce the death.]

It is of significance that regardless of what "alternate theories" the prosecution may attempt to proceed upon, they must always carry the burden to prove beyond a reasonable doubt that petitioner's acts were the proximate cause of his wife's death. Thus, so called "alternate theories" of "express and implied malice" noted in the slip opinion, Appendix "A", do not circumvent this fundamental requirement and burden on the people of California. It is to be noted in CAL JIC 8.55, supra, that both **murder and manslaughter** in Califonria require that the People carry the burden to demonstrate the proximate cause element. **In Re Winship**, 397 U.S. 358, 364.

Thus any "alternate theories" to a felony-murder theory proceeds on the same necessity to prove that petitioner's acts were the proximate cause of his wife's death. That having once been resolved against California, it can not now relitigate it in a murder prosecution.

The key question presented to this court is the meaning of the legal phrase "necessarily decided."

After the Court ruled in favor of the Defendant's motion, . . .citing that he had ruled as a question of fact on the element of the proximate cause of death, . . .the Deputy District Attorney and the Court got into a heated argument. This was as to the propriety of the People even pursuing the case. The Court pointed out that he had heard all of the evidence, that there seemed to be little evidence of either express or implied malice, and the thrust of the case, as it was at the preliminary hearing, seemed to be along the theory of felony-murder. However, since the Court's then recent decision in **People v. Burroughs** (1984) 35 Cal.3rd 824, directly affected this case, the Court didn't feel, as a practical evidentiary matter, that the People had much of a case. The Court **did not decide, nor do we contend**, that **People v. Burroughs (supra)** effects the question at issue. It is a non-issue dwelled upon only by the People and the Court of Appeals.

Similarly, during that heated discussion, the Deputy District Attorney argued to the Court that even if collaterally estopped, that, in essence, the Defendant should be estopped from making such a motion since on March 3,

1984, after a chambers conference, when the People made a last minute motion to continue to await the decision of the Court of Appeals, the Defendant objected. The Court relied that such an argument was not one in good faith since the People had never asked for a stay of the trial, and for five months had never sought a continuance on those grounds (while in fact seeking and obtaining three others on scheduling grounds.) The Court **did not decide, nor do we contend**, that the failure of the People to seek either a stay or continuance of trial effects the issue before the Court, other than as a rebuttal to the People's contention of the Defendant seeking to take tactical advantage.

The Court of Appeals in its opinion, (attached hereto as Appendix A), on page 5, found that their "Review of the record indicates the cause of death was actually litigated."

Both Parties, and the Court of Appeals, seem to agree that the case that is controlling in defining when collateral estoppel attaches, is **People v. Taylor**, (1974) 12 Cal.3rd 686, 691:

> . . ."If (1) The issue necessarily decided at the previous (proceeding) is identical to the one which is sought to be relitigated; if (2) the previous (proceeding) resulted in a final judgment on the merits; and if (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior (proceeding)."

There seems to be no dispute as to this case meeting all elements of the "Taylor" test, save the question at bar as to whether the trier-of-fact's decision as to proximate cause of death was "necessarily decided", as opposed to just "decided."

The Court of Appeals' opinion page 5, asserts that the finding of fact, while actually litigated, was not "necessarily" decided, and thus collateral estoppel under **People v. Taylor, (supra)**, does not bar prosecution. The Court first, quite improperly, argues that in final argument the Counsel for the People only argued the theory of "risk" and submitted on that argument. While we disagree, even if so, the law is clear that the trier of fact is instructed that "statements made by the attorney during the trial are not evidence;. . ." (CALJIC 1.02), and to ". . .determine the facts of the case from the evidence received in the trial and not from any other source. . .to apply the law. . .to the facts as you determine them and in this way to arrive at your verdict." (CALJIC 100).

Nowhere does it appear in the record that the People withdrew from the consideration of the trier-of-fact the theory of the felony practicing of medicine in a manner that actually caused the death. As the record discloses, this issue was actually litigated, and the trier-of-fact, doing his job, made a finding of fact necessary to a final judgment. In examining the evidence propounded and litigated by the People as to their second alternative theory of guilt, the trier-of-fact found against them on the issue of prox-

imate cause of death, and in so doing rejected their offered proof on that theory. The trier-of-fact in examining the evidence as to the "risk" theory, made findings of fact to support his judgment on that theory.

The Court of Appeals, in searching for legal precedent, relied on two citations which are unhelpful.

The Court of Appeals cites **Wilson v. Interlake Steel Co.** (1982) 32 Cal.3rd 229, 234. All that cite tells us about this civil nuisance case is:

> "HOWEVER, IT IS UNCLEAR FROM THE RECORD BEFORE US WHETHER SUCH A FINDING IN FACT WAS MADE, OR WHETHER, ALTERNATIVELY, THAT FINDING WAS NECESSARY FOR THE COURT'S DECISION, THEREBY PRECLUDING THE RELITIGATION IN THE PRESENT ACTION."

They had an unclear record, period, though the case does imply that, the phrase "necessarily decided" means a factual finding necessary to answer all the legal elements put in issue and litigated.

Also cited was 7 **Witkin Cal. Procedure** para. 268, pg. 710; all that **secondary** authority states is:

> "IF A FINDING OR OTHER DETERMINATION OF ANY ISSUE IN THE FIRST ACTION WAS **ENTIRELY UNNECESSARY** TO THE JUDGMENT, IT WILL NOT HAVE THE EFFECT OF COLLATERAL ESTOPPEL." (Emphasis supplied)

Again, it does not define, but implies, that any factual element put in issue for factual determination in order to reach a judgment meets the test of "necessarily decided", only excluding an "**issue . . .entirely unnecessary**" to deciding the ultimate judgment.

There is no question that the People, having presented and litigated the theory of the actual cause of death as an element of one of their alternative theories, were entitled of necessity to a finding and decision. What the Court of Appeals seems to be saying, is that in a criminal case where several alternative theories are presented to a Court, and evidence offered as to those issues, where a judgment can be found on any of those theories, an adverse finding of fact as to alternative theories becomes an "unnecessary" decision in terms of the "Taylor" definition, and collateral estoppel does not apply. This would seem to be contrary to **People v. Taylor, (supra)**, itself, and would be violative of the U.S. Constitution's guarantee against double jeopardy and due process.

> As stated . . .in **People v. Taylor, (supra)**, at 692: "IN CRIMINAL CASES THE BAR OF COLLATERAL ESTOPPEL IS CONSTITUTIONALLY COMPELLING WHEN THE SAME DEFENDANT WAS INVOLVED IN BOTH TRIALS, (**ASHE V. SWENSON**, (1970) 397 US436, 443-447, 90 S.Ct. 1189, 25 L.Ed.2nd 469)".

And in **Ashe v. Swenson, (supra)**, itself this Honorable Court stated at 90 S. Ct. 1194:

> "THE FEDERAL DECISIONS HAVE MADE CLEAR THAT THE RULE OF COLLATERAL ESTOPPEL IN CRIMINAL CASES IS NOT TO BE APPLIED WITH THE HYPERTECHNICAL AND ARCHAIC APPROACH OF THE 19TH CENTURY PLEADING BOOK. BUT WITH REALISM AND RATIONALITY...THE INQUIRY MUST BE SET IN A PRACTICAL FRAME AND VIEWED WITH A EYE TO ALL THE CIRCUMSTANCES OF THE PROCEEDINGS. (Citation)' ANY TEST MORE TECHNICALLY RESTRICTIVE WOULD, OF COURSE, SIMPLY AMOUNT TO A REJECTION OF THE RULE OF COLLATERAL ESTOPPEL IN CRIMINAL PROCEEDINGS. . ."

The Court of Appeals has, of course, done the opposite. The Court of Appeals concedes that the issue of proximate cause of death would be an element of homicide (Opinion pg. 4) that the People would have to litigate in a second trial, and that issue was actually litigated (Opinion pg. 5) and decided against the People by the trier-of-fact in this same case involving the exact same factual transaction. But then the Court of Appeals, "Hypertechnically and with the archaic approach of 19th Century pleading," concludes that there is no bar to a second trial because the decision was "not necessarily" decided since the verdict

could be rendered on the alternative evidence of the People. This Court needs to define "necessarily decided" as a decision based upon the evidence offered necessary to decide an element of an offense put in issue and actually litigated. Only then will **People v. Taylor, (supra)** have any meaning within the limits of the U.S. Constitution as that case itself recognizes.

Otherwise, whether an acquittal or a conviction on a limited number of counts or theories, with the modern rules of alternative pleading, the prospect for endless litigation over the same essential elements and issues is limitless.

CONCLUSION

This Honorable Court should grant certiorari to re-emphasize that a state criminal defendant cannot within the provisions of either state or federally-protected rights, be re-charged with and tried for a state crime for murder where the Trial Court has once found that the state defendant was not the proximate cause of the death of the decendant, a necessary element of the crime of murder and/or manslaughter in California.

Dated this 10th day of April, 1986 at Santa Ana, California, 92701.

Respectfully submitted,

ROGER S. HANSON
Attorney for Petitioner
Member of the Bar, U.S. Supreme Court

STATEMENT OF RELATED CASES

Pursuant to Rules of the United States Supreme Court, petitioners and their counsel know of no cases that are related to this case and petition for certiorari which are now pending before this court.

Dated April 10, 1986

Roger S. Hanson
Attorney for Petitioner
Member of the Bar
Supreme Court of the
United States

APPENDIX A

COURT OF APPEALS OPINION

People v. Morgan _____ Cal.App.3d _____ _____ Cal.Rptr. _____

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. VOLNEY CLENOM MORGAN, Defendant and Respondent.

) 2d Crim. No. B006752
)(Super. Ct. No. A528722)
)
)

APPEAL from an order of dismissal of the Superior Court of Los Angeles County. Peter S. Smith, Judge. Reversed and remanded.

Ira Reiner, District Attorney, Harry B. Sondheim, Head Appellate Division, and Dirk L. Hudson, Deputy District Attorney, for Plaintiff and Appellant.

Chula and May Law Corporation and Alan M. May for Defendant and Respondent.

Plaintiff and appellant The People of the State of California (People) appeal from an order of the superior court granting defendant and respondent Volney Clenom Morgan's (Morgan) motion to dismiss a count charging him with murder.

Because the issue of causation of death was not necessarily decided in the prior proceeding, the People are not collaterally estopped from trying Morgan for murder; and because the People were also proceeding under alternative theories of express and implied malice, it was error to dismiss the murder count merely because a felony murder theory was not viable. Therefore, we reverse the order.

FACTUAL AND PROCEDURAL BACKGROUND

On June 1, 1982, a complaint was filed charging Morgan with violation of Penal Code §187, murder, violation of Business and Professions Code §2053 (section 2053), practicing medicine without a license, and three counts of violating Health and Safety Code §11377, possession of a controlled substance.

On November 5, 1982, Morgan filed a motion to dismiss pursuant to Penal Code §995, based upon insufficiency of the evidence. On November 23, 1982, the motion was heard, and the murder count was dismissed.

On January 13, 1983, the People noticed their appeal of the November 23, 1982 dismissal.

On March 3, 1983, trial commenced on the remaining four counts. Morgan was convicted of practicing medicine without a license and two counts of possession of a controlled substance, all felonies, and was sentenced to two years probation.

On January 25, 1984, this court filed its opinion in **People v. Morgan**, 2d Crim. No. 43990, reversing the trial court's order of dismissal, and thereafter the murder count was reinstated.

On May 14, 1984, the trial court granted Morgan's motion to dismiss the murder count. It is from that post-remittitur dismissal that the People now appeal.

CONTENTIONS

The People contend it was error to dismiss the murder count in that: (1) Morgan's conviction of the unlicensed practice of medicine under circumstances or conditions which create the risk of great bodily harm or death does not collaterally estop the People from prosecuting Morgan for murder; (2) The fact that a felony murder theory cannot be predicated on the felonious unlicensed practice of medicine does not preclude a murder prosecution

predicated on alternative theories (e.g., express or implied malice); and (3) the trial court's dismissal cannot be predicated on the People's failure to obtain a stay of trial on the unlicensed practice of medicine count.

DISCUSSION

1. Morgan's prosecution for murder is not collaterally estopped by his conviction of unlicensed practice of medicine.

The trial court held the People were collaterally estopped from trying Morgan for murder because in convicting Morgan of the unlicensed practice count it had made findings that there was no proof of causation of death.

An element of homicide is that the defendant's criminal act or omission be the proximate cause of the death. (1 Witkin, Cal. Crimes (1st Ed. 1964 §295, p.271)

Collateral estoppel will bar relitigation of an issue decided at a previous proceeding "if (1) the issue **necessarily** decided at the previous [proceeding] is **identical** to the one which is sought to be relitigated; if (2) the previous [proceeding] resulted in a final judgment on the merits; and if (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]." (**People v. Taylor** (1974) 12 Cal.3d 686, 691, italics added.)

Morgan was convicted of violating §2053, which provides in pertinent part: "Any person who willfully, under circumstances or conditions which **cause** or **create risk** of great bodily harm, serious physical or mental illness, or death, practices or attempts to practice, . . . , any system or mode of treating the sick or afflicted in this state, or diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person, without having at the time of so doing a valid, unrevoked, or suspended certificate as provided in this chapter, or without being authorized to perform such act pursuant to a certificate obtained in accordance with some other provision of law, is punishable by imprisonment in the county jail for not exceeding one year or in the state prison." (Italics added.)

In other words, §2053 provides that felonious practice of medicine without a license can be committed in one of two ways: either by causing, or, by creating the risk of, great bodily harm or death.

Our review of the record indicates the cause of death was **actually litigated**. The People called Dr. Schnittker from the office of the Chief Medical Examiner to testify as to her opinion as to the cause of death. However, the issue of cause of death was **not necessarily decided** by the trial court. The record indicates the People argued and submitted their case on the theory that Morgan's conduct created a risk of death. The trial court then found Morgan

guilty beyond a reasonable doubt as to the unlicensed practice count by finding the injection of Talwin into the decedent, together with the fact that she was not taken to the hospital, were the circumstances or conditions which **created the risk** of great bodily harm or death. Although the trial court expressed its doubts as to the actual or proximate cause of death, those remarks were surplusage, and it was unnecessary for the trial court to reach that threshold, because the People were not proceeding on that theory.

If a finding or other determination of an issue in the first action was unnecessary to the court's decision, it will not have the effect of a collateral estoppel. (**Wilson v. Interlake Steel Co.** (1982) 32 Cal.3d 229, 234; 7 Witkin, Cal. Procedure (3d Ed. 1985) Judgment §268, p. 710). Because the issue of whether Morgan's conduct was the proximate cause of death was not one necessarily decided in the earlier proceeding, collateral estoppel will not bar prosecution of Morgan for murder.

Separately, the People contend the trial court erred in its assertion that the People were collaterally estopped by way of their failure to obtain a stay on the §2053 count while the appeal from the dismissal of the murder count was pending. Strategically, had the People been able to obtain a stay, which is highly unlikely in light of Morgan's speedy trial right, any possible collateral estoppel problem would have been avoided. However, the absence of any request by the People for a stay is immaterial, as there is no collateral estoppel for the reasons already discussed.

2. The trial court erred in dismissing the murder count in that although People v. Burroughs (1984) 35 Cal.3d 824 may have precluded a felony murder theory, the People were also proceeding on alternative theories of express or implied malice.

The trial court held **Burroughs** required dismissal of the murder count because "second degree felony murder is no longer viable for a violation of § 20053 [2053] of the Business and Professions Code."[1]

The People concede **Burroughs** precludes their proceeding under felony murder, but contend it was error to dismiss in that the People were also proceeding under alternative theories of express and implied malice. That contention is correct, and we only need call the trial court's attention to our opinion in the first appeal, wherein we held, inter alia, that there was sufficient evidence to hold Morgan to answer for a charge of murder on a theory of express or implied malice.

Further, **Burroughs** itself held that, while the defendant could not be convicted of second degree felony murder, an unintentional homicide committed in the course of a non-inherently dangerous felony may support a conviction of

1. **People v. Burroughs, supra**, at page 827, held that while the felonious unlicensed practice of medicine can in many circumstances, pose a threat to the health of the individual being treated, commission of that crime does not inevitably pose danger to human life, so that a violation of §2053 does not provide the predicate for a felony murder conviction.

involuntary manslaughter, if the felony is committed "'without due caution and circumspection.'" (**Id.**, at p. 835.) The same is true in the instant case -- although Morgan could not be held to answer for felony murder for the death which occurred in the course of his committing the §2053 felony, if that felony were committed without due caution and circumspection, there still remained the possibility of his being convicted of involuntary manslaughter.

DISPOSITION

The post-remittitur dismissal of the murder count is reversed and the case is remanded for trial.

NOT TO BE PUBLISHED

Klein, P.J.

We concur:

Danielson, J.

Arabian, J.

APPENDIX B

ORDER OF CALIFORNIA SUPREME COURT
DENYING REVIEW

entered February 14, 1986.

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
2ND District, Division 3, No. B006752

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

PEOPLE, Appellant,

v.

VOLNEY CLENOM MORGAN, M.D., Respondent

Respondent's petition for review DENIED.

On the recommendation of the Court of Appeal pursuant to Rule 978 of the California Rules of Court, the Reporter of Decisions is directed to publish the opinion in the above-entitled case in the Official Reports. See subdivision (c) of Rule 978.

BIRD

CHIEF JUSTICE

PROOF OF SERVICE

STATE OF CALIFORNIA)

) ss:

COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 7131 Mission Blvd., Riverside, California 92509.

On April 15, 1986, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action, by placing a true copy in each of three (3) sealed envelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

Clerk of the Superior Court
County of Los Angeles
111 North Hill Street
Los Angeles, CA. 90012

Clerk, Court of Appeal
2nd Appellate District
3580 Wilshire Blvd., 3rd Floor
Los Angeles, CA. 90010

District Attorney of Los Angeles
Attention: Ira Reiner
18000 Criminal Courts Bldg.
210 W. Temple Street
Los Angeles, CA. 90012

I certify under the penalty of perjury that the foregoing is true and correct.

EXECUTED on April 15, 1986, at Riverside, Calif.

_____

JACK GALLAGHER